IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 241 of 2005

WITH

CIVIL APPLICATION No.11642 of 2005

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CIVIL APPLICATION No.11643 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SONABEN WD/O LALABHAI KOHYABH-AI VANKAR & 4 - Appellant(s)
Versus
KHUSHALBHAI SOMABHAI & 4 - Defendant(s)

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Appearance :
MR PRASHANT G DESAI for Appellant(s) : 1, 1.2.1,1.2.2
None for Defendant(s) : 1 - 5.
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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 21/08/2006

ORAL JUDGMENT

1. With the consent of the parties, the matter is finally heard.

2. On 20/12/2005, the appeal was admitted for hearing the parties on the following substantial question of law;

   (i) Whether the first Appellate Court could have allowed the appeal on the basis of a document produced before it in light of provisions contained in Order 41 Rule 27, which was an order passed by the Deputy Collector remanding the matter to Mamlatdar to decide the question of possession treating the same as concluded issue on possession?

3. From the records, it would appear that the respondents filed the suit submitting inter-alia that they are true and recorded owners of the land in question and as they are

in possession of the property, they be so declared and the present appellants be restrained from interfering with their possession. The parties joined the issue, the present appellants – defendants submitted that they were in cultivating possession of the property and on their application, the Mamlatdar had already directed that their cultivating possession be recorded in “Pani-Patrak”. Agreeing with the submission made by the defendants, the trial court dismissed the suit. The plaintiffs being aggrieved by the said judgment and decree, filed Regular Civil Appeal and also submitted an order passed by the Deputy Collector which set aside the order passed by the Mamlatdar and remitted the matter to the Mamlatdar for deciding the issue afresh. The Appellate Court holding that there was no order by any competent court or authority in favour of the defendants, decreed the suit. Being aggrieved by the said judgment and decree, the defendants are before this Court.

4. During the course of the submissions, it was agreed between the parties that after giving due opportunity of hearing to the parties, the Mamlatdar has again decided the matter in favour of the present appellants. Learned

counsel for the respondents – plaintiffs submits that the said order passed by the Mamlatdar has been subjected to an appeal before the Deputy Collector.

5. As the order passed by the first Appellate Court was based upon the findings recorded by the Deputy Collector and further on the ground that the order of Mamlatdar has already been set aside, with the change in the circumstances and as the subsequent events have come into existence, it will have to be held that the judgment and decree passed by the first Appellate Court now have become wrong. The judgment and decree passed by the learned first Appellate Court on this short ground deserve to and are accordingly set aside. The matter is remanded back to the first Appellate Court with the direction to decide the matter afresh in accordance with law. If the order passed by the Mamlatdar stands set aside by the competent Appellate Revenue Court, then the effect of the same would be taken into consideration and in case the plaintiffs propose to make some application for alternative relief or converting their suit from a suit for declaration of title and injunction to a suit for declaration of title and possession, then such an

application shall be decided in accordance with law. In case such application is allowed, then proper opportunity of consequential amendment would be given to the defendants. If the Court is of the opinion that after casting an additional issue on the strength of the evidence already available on the record, the matter can be disposed of, then it should decide the matter finally. But in case it comes to the conclusion that the matter needs further evidence, then, in accordance with the provisions contained in Order 41 Rule 27, it may record the evidence and decide the matter or in the alternative, may remand the case back to the trial court under Order 41 Rule 23 or Rule 23(A) of the Code of Civil Procedure for a decision afresh. The appeal is allowed with the directions and observations aforesaid.

6. As the appeal stands disposed of Civil Application Nos.11642 and 11643 are also disposed of.

(R.S.GARG,J.)

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